QUESTIONS PRESENTED

This appeal presents each of the questions presented in appeals No. 191 (*Travia* v. *Lomenzo;* Jurisdictional Statement, pp. 3-4) and No. 449 (*Screvane* v. *Lomenzo;* Jurisdictional Statement, pp. 4-6), as well as the following additional questions:

(a) Did the District Court err in entering an order which prevents all citizens of New York from taking action in the courts of that State to insure that, commencing January 1, 1966, the apportionment of the New York Legislature will comply with the Constitutions of both the United States and the State of New York?

(b) Did the District Court err in denying the motion of appellants Travia and Zaretzki for a stay of the May 24, 1965 order, pending timely action on reapportionment by the New York courts, in light of the decision of the United States Supreme Court in *Scott* v. *Germano,* 381 U. S. 407 (1965) and the injunction entered by the New York Court of Appeals in *Glinski* v. *Lomenzo,* 16 N. Y. 2d 27 (1965)?

STATEMENT OF THE CASE

The facts, as of May 26, 1965, which are material to the consideration of the questions presented on this appeal, are set forth in the Jurisdictional Statements in appeals No. 191 (*Travia* v. *Lomenzo,* pp. 4-6) and No. 449 (*Screvane* v. *Lomenzo,* pp. 7-10). Accordingly, the statement of the case here will be limited to events subsequent to May 26, 1965.

On June 1, 1965 this court denied the application of appellants Travia and Zaretzki for a stay of the May 24,

1965 order and denied the motion of these appellants for accelerated consideration of their appeal from that order; Mr. Justice Harlan dissented. 381 U. S. 431 (1965).

Later in June, 1965, two citizens of New York State commenced, in the courts of that State, the action of *Glinski* v. *Lomenzo*. These citizens sought to restrain the Executive Officers of New York State from violating their oaths of office by conducting an election on the basis of Plan A. The *Glinski* plaintiffs were successful. The New York Court of Appeals held that it "must now perform . . . [its] sworn duty by preventing the holding of an election which violates . . . [the] State Constitution", 16 N. Y. 2d 27, 29, and it enjoined "the holding of an election on November 2, 1965 under Plan A."* In addition, the majority and dissenting opinions in *Glinski* made it plain that the Court of Appeals recognized its obligations under our Federal system and was prepared to insure that the 1966 legislative apportionment would comply with the requirements of the Fourteenth Amendment.

On the very day the Court of Appeals enjoined the holding of the unconstitutional Plan A election, the Governor, Attorney General and Secretary of State of New York (hereinafter "the Executive Officers") asked the three-Judge District Court in this proceeding to nullify the Court of Appeals order and to impose an unconstitutional Plan A election upon New York State. By order to show cause, entered on July 9, the Executive Officers moved before the three-Judge panel on July 13 for an order enjoining any steps which might interfere with a Plan A election in 1965.

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*The order provides, in pertinent part, as follows:

"Order modified, without costs by reinstating so much of the order of Special Term as contained an injunction against the holding of an election on November 2, 1965 under Plan A, and, as so modified, affirmed."

On July 13, after oral argument on the Execuitve Officers' motion, the District Court read its opinion and rendered the order here appealed from. It was apparent that both the opinion and order had been prepared prior to the hearing. The District Court also denied the oral motion of appellants Travia and Zaretzki to stay the May 24 order pending timely action on apportionment by the New York courts.

Appellants appealed from the July 13 order on July 14 and applied to Mr. Justice Harlan for a stay of that order in light of the developments in *Glinski*. In addition, appellants Travia and Zaretzki reapplied for a stay of the May 24 order. Mr. Justice Harlan denied the application and reapplication for a stay; referring to the Court's actions concerning the May 24 order, he wrote:

> "Were this Court in session I would have referred both of these applications to it for disposition, as was done with the earlier application for a stay of the District Court's order of May 24. *Travia* v. *Lomenzo, supra.* I consider it, however, my duty in the circumstances to act on these applications myself, deeming that I would not be justified in asking The Chief Justice to take steps to convene the Court in special session. Given what has already transpired, I am left in no doubt as to what the decision on these applications must be." (Footnote omitted)

While these Federal-court proceedings were taking place, appellants Travia and Zaretzki moved in the State courts to prevent another unconstitutional election of the New York Legislature in 1966. On July 12, 1965 (the day before the entry of the order here appealed from) these appellants moved, by order to show cause, in the Supreme Court of the State of New York to intervene in *Matter of*

Orans and for relief which would insure a bi-partisan and fully constitutional apportionment (under both Federal and State Constitutions) of the New York Legislature commencing in 1967. These appellants would have also moved in the *Orans* case for relief to insure a fully constitutional apportionment commencing in 1966. However, they refrained from so doing because an article in the *New York Times* of Sunday, July 11, incorrectly reported that the Federal District Court had temporarily enjoined all State-court proceedings pertaining to the apportionment of the 1966 Legislature.

The motion of appellants Travia and Zaretzki to intervene in *Orans* was granted by Mr. Justice Gerald P. Culkin of the Supreme Court of the State of New York, and Mr. Justice Culkin rendered an opinion and entered an order providing that the New York Courts would order a fully constitutional and timely apportionment of the 1967 New York Legislature if it appeared that the Executive Officers and Legislature would not do so. (Mr. Justice Culkin's opinion is set forth in Appendix B hereto; his order is set forth in Appendix C hereto.) Mr. Justice Culkin wrote:

> "However, having affirmed my faith in the ability of our Legislature to perform its constitutional duty, I cannot close my eyes to the possibility that our Legislature may, nevertheless, fail to seasonably act. The consequences of legislative inaction are unmistakeably clear—judicial intervention and, if necessary, judicial assumption of the legislative task of reapportionment (see, *e. g., Reynolds* v. *Sims,* 377 U. S. 533).
>
> * * *
>
> "* * * Whatever apportionment plan is adopted for the November 1966 election must eventually be

submitted to the three-judge District Court to determine the plan's conformity to federal constitutional standards. However, the question remains, shall the State court enter the picture, commence supervision of reapportionment and thus incline the Federal court to stay its hand until the sole issue remaining is the federal question of compliance with the one-man, one-vote mandate?

"Indeed, the basic question presented to this court is not whether there shall be judicial intervention in the event of legislative inaction or impotence. Judicial intervention is a foregone conclusion in that unfortunate event. The question to be decided is whether immediate and direct supervision shall be assumed by the State courts or whether the Federal court shall be obliged to again fill the void created by State inaction. Our Court of Appeals has already dictated the choice. 'To turn the whole thing over to the Federal courts would be an abdication of the State's sovereignty.' (*Matter of Orans,* 15 N. Y. 2d 339, 352.)"

* * *

"Considering all of these factors the court determines that it must at this time assume a supervisory role in reapportionment. However reluctantly, this court must impose deadlines upon the Legislature, and in the event of legislative inaction, this court must be prepared to insure that the November 1966 election and the subsequent Constitutional Convention are had pursuant to a redistricting and reapportionment plan which is in conformity with the New York State Constitution as well as the Federal Constitution. Therefore, the intervenors' motion is granted as follows: The court decrees that the regularly scheduled November 1966 election for a normal

two-year term shall be held under a plan to reapportion the Senate and Assembly of this State, which complies with the Fourteenth Amendment of the United States Constitution and with all applicable provisions of the New York State Constitution not in conflict with the United States Constitution. Respondents shall submit such plan for this court's approval on or before February 1, 1966. Upon the failure of respondents to submit such a plan, this court shall undertake the formulation of a reapportionment plan which shall, with Federal District Court approval, govern the November 1966 election of members of the New York Legislature. The finally approved plan shall also form the basis for any primary contests to nominate candidates for the Legislature, for the nomination of delegates to the Constitutional Convention and for any special election to fill vacancies prior to December 31, 1968. The court may upon its own motion, at any time, appoint an appropriate number of referees, or jury of experts, to assist in the formulation of a comprehensive reapportionment plan as aforesaid, should the court determine that the Legislature and the respondents herein are not proceeding with reasonable diligence so as to permit completion of a valid plan by February 1, 1966. The court also reserves decision as to whether or not it shall, in all events, appoint such referees or experts to assist the court in determining whether such plan or plans as are submitted by respondents are in conformity with constitutional requirements."

The opinion and order of Mr. Justice Culkin underscored what had been made clear by the Court of Appeals in *Orans* and in *Glinski*—that, if necessary, and if not pro-

hibited from doing so by the Federal courts, the New York courts stand ready and willing to exercise their powers to provide for a legislative apportionment which meets both Federal and State Constitutional requirements. Mr. Justice Culkin's opinion and order in *Orans* should prevent an unconstitutional apportionment of the 1967 Legislature. Moreover (and for the purposes of this appeal, more important), the positive action of Mr. Justice Culkin and the opinions of the Court of Appeals in *Glinski* and *Orans* demonstrate that the New York courts were prepared, ***and are still prepared,*** to prevent an unconstitutional apportionment of the 1966 Legislature.

THE SUBSTANTIALITY OF THE QUESTIONS PRESENTED

The fundamental question posed by this appeal is whether the District Court may prevent the New York courts from taking steps to provide for a legislative apportionment which meets both Federal and State constitutional requirements. The July 13 order prevents the New York courts from doing anything with respect to the apportionment of the 1966 Legislature. It imposes upon New York State an unconstitutional election and an unconstitutional Legislature; and it does so despite the fact that the New York courts are prepared to perform their sworn duty to uphold the Federal and State Constitutions.

This grave and needless transgression upon state sovereignty raises questions which are, to say the least, substantial. Indeed, in the area of Federal-state relations it is hard to conceive of any question which is more important than the respective roles of the Federal courts and the State organs of government in apportionment matters.

The questions presented by the appeals from the May 24 order which mandated the Plan A election are discussed

in the Jurisdictional Statements filed in appeals No. 191 (*Travia* v. *Lomenzo*, pp. 6-13) and No. 449 (*Screvane* v. *Lomenzo*, pp. 10-16), and these questions need not be discussed here. However, additional and equally important questions are posed by the July 13 order which bars the doors of the State courts. These new questions involve: (a) the propriety of the District Court order preventing the State courts from providing for a fully constitutional reapportionment; and (b) the effect of this order upon the political and governmental processes of New York State.

The Prohibition of State-Court Action

This Court has held on numerous occasions that in reapportionment proceedings the sole legitimate concern of the Federal courts is to insure compliance with the Fourteenth Amendment. So long as the organs of State government are prepared to insure such compliance, the Federal courts must stay their hands and must defer to the States on questions involving the method of apportionment. *E.g., Scott* v. *Germano*, 381 U. S. 407 (1965); *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *Scranton* v. *Drew*, 379 U. S. 40 (1964).

The July 13 order, by prohibiting the New York courts from acting with respect to the apportionment of the 1966 Legislature, flies in the face of the holdings of this Court which require deference to State courts on reapportionment matters. Instead of deferring to the New York courts which stand ready to act and to enforce the Fourteenth Amendment, the District Court in this proceeding has, like the District Court in *Scott* v. *Germano*, *supra*, improperly utilized its powers to take this matter of State government out of the hands of the State courts.

Moreover, even if there was some question as to whether the New York courts would insure compliance with the

Fourteenth Amendment commencing in 1966 (and it is perfectly clear that they would insure such compliance), the method of apportionment of the 1966 Legislature should have been left up to the State courts. In *Scott* v. *Germano, supra,* and *Maryland Committee* v. *Tawes,* 377 U. S. 656, 675 (1964), malapportioned Legislatures were permitted to remain in office until at least 1967, when their constitutional terms expired, so as to provide the organs of State government with sufficient time to effectuate a constitutional apportionment. Surely, New York should have been allowed as much time as Maryland and Illinois to work out its reapportionment problem. New York is larger and more heterogeneous than Maryland and Illinois; its Legislature has taken affirmative and responsible steps designed to provide for a bi-partisan and fully constitutional apportionment (Jurisdictional Statement in *Travia* v. *Lomenzo,* No. 191, pp. 9-12); its courts have in the *Orans* and *Glinski* cases met their constitutional responsibilities; and the term of its present Legislature should, under the State Constitution, continue through 1966 (Article III, Sections 2, 8). Under all of these circumstances there is no reason for the District Court to impose an unconstitutional apportionment upon New York.

The Need for An Authoritative Determination

As a result of various attempts by different citizens, groups, public officials, Legislatures and courts to apply in practice the principles laid down in *Reynolds* v. *Sims,* confusion is rampant in New York. Six appeals are now pending in this Court involving the apportionment of the New York Legislature. The lines of legislative districts have been drawn and redrawn, and State Legislators will be running from three different districts in three consecutive years. In addition, the organization of the State's political parties, which is based upon Assembly District lines, has been disrupted. In short, there is political turmoil.

The July 13 order precluding the State courts from supervising the apportionment of the 1966 Legislature aggravates the turmoil and confusion.

There is no question but that the mandate of *Reynolds* v. *Sims* will be complied with in New York. The issue now is how to adopt the "one man, one vote" rule in New York without further needless confusion and without doing further violence to the State's Constitution and sovereignty.

A review of the July 13 order by this Court—and a reversal of that order—would serve to remove the confusion and to re-establish the proper boundaries between Federal and state spheres of interest on reapportionment matters. Such a review would also help to resolve the unfortunate conflict between the Court of Appeals order in *Glinski* and the July 13 order herein. And, finally, only the decision of this Court can authoritatively dispose of the vital questions presented by the entry of the May 24 and July 13 orders, namely, (a) is the Plan A election legal, and (b) would a Legislature elected along Plan A lines, in needless violation of the State Constitution, have the power to legislate?

In sum, a review of this order would serve to definitively dispose of all unanswered questions concerning the apportionment of the 1966 Legislature, and to establish guidelines for questions involving the apportionment of future Legislatures.

CONCLUSION

Without the firm guidance and final authority of this Court, confusion in New York will continue and the District Court's unwarranted disregard of the New York Constitution will go uncorrected and may be repeated.

Jurisdiction should be noted and the order here appealed from reversed.

Respectfully submitted

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Dated: New York, New York
September 30, 1965

APPENDIX A

Order Appealed From and Opinion Below

JUDGE WATERMAN: First of all, we deny the motion of Messrs. Glinski and Keenan that the proceeding before us this day be dismissed.

Gentlemen, we have read the recent opinions of the judges of the New York Court of Appeals with great respect and with no little concern. We have great respect for the individual judges of that court as individual judges, and we share of course with the entire American judicature great respect for the court as a court.

We had thought that the order of this court of May 24, 1965, and the subsequent denial of a stay of this order by the United States Supreme Court, at last laid to rest all objections to this court's order mandating an election in the fall of 1965 of a new State Legislature to hold office for a term of one year.

We do note the statement of the chief judge of the New York Court of Appeals, however, that, and I quote, "Despite those illegalities of Plan A under which a 1965 election is supposed to be held, we would of course be obliged to respect and follow the federal court's orders that such an election be held this year if those courts had made final and binding orders therefore."

We intended the order of this court of May 24, 1965, to be exactly such an order, so directing. We believe the order did expressly state such a judgment, but to remove any question as to its purpose, intent or wording, we are entering a further order containing mandatory and injunctive provisions.

JUDGE RYAN: I concur with the statement now made by Judge Waterman.

JUDGE LEVET: I concur with this statement.

Appendix A

I have heretofore expressed my opinion against the use of Plan A as the basis for the election to be held in November, 1965, although I have alway approved of a 1965 election. However, the majority of this court has directed and has ordered the use of that plan, Plan A, in this year's election of the members of the Legislature for the year 1966. The United States Supreme Court has refused to stay such election on such a basis.

The election machinery of this state, as has already been indicated here this morning, has been implemented to the use of Plan A for the 1965 election. A shift at this time would create endless confusion.

Accordingly, I concur at least in the result directed by the statement made here by Judge Waterman, and I concur in the order which is this day made,

JUDGE WATERMAN: I would like to read the order which like the order before was read in court.

"Acting upon an application dated April 19, 1965, presented to us by the Attorney General of the State of New York, and after proceedings thereon in open court on May 10, 1965, and on May 24, 1965, this court at the conclusion of the May 24, 1965, hearing filed in open court in the presence of counsel an order embodying the following mandates:

> "'It is hereby ordered that,
>
> "'1. An election of members of the New York State Legislature shall be held on November 2, 1965 provided that the terms of the members so elected on that date or at any special election to fill vacancies, shall expire on December 31, 1966.
>
> "'2. Though the purported statute is itself ineffective, the scheme set forth in the Reapportionment Compliance Act, Chapter 976 of the Laws of

1964, together with such clerical corrections as have been certified to us by the Secretary of State pursuant to our order of May 10, 1965, in accord with the procedures set forth in Section 403 of said ineffective Act, shall form the basis for the election of members of the New York State Legislature at the general election on November 2, 1965 and for any primary contest to nominate candidates for the Legislature or for any special election to fill vacancies prior to December 31, 1966.'

"There is attached hereto and made a part hereof copies of the Act and the certified clerical correction."

Counsel will recall that I handed the order with the Act attached to it and the corrections from the Secretary of State over the top of the bench and to the clerk.

Back to the order.

"'3. Jurisdiction of further proceedings which may be found to be necessary in this court is retained.'

"Notice of entry of this order was mailed to the attorneys for all parties on May 25, 1965, and on that day we denied an application filed on behalf of plaintiff-intervenors Anthony J. Travia and Joseph Zaretski for a stay pending appeal of the order.

"The Supreme Court of the United States on June 1, 1965, one justice dissenting, denied both a motion to accelerate the hearing of the appeal and a motion to stay our order pending appeal.

"Despite the foregoing, on or about June 22, 1965, one Frank J. Glinski and one William F. Keenan filed a suit in the Supreme Court of the State of New York, Albany County, seeking, among other things, an order restraining

the Secretary of the State of New York from taking any action in obedience to our May 24, 1965, order.

"On July 5, 1965, a justice of that court granted that prayer, and on July 9, 1965, after the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, on July 7, 1965, had unanimously reversed the lower court, the New York Court of Appeals reversed the Appellate Divison and reinstated the Supreme Court justice's injunctive order.

"On July 9, 1965, application was then made to this court for an order requiring Glinski and Keenan to show cause why they and all parties to this action should not be enjoined from interfering with the carrying out or execution of our order of May 24, 1965, and for other relief appropriate to effecuate said order; and

"Now, after notice of said application, hearing thereon this day, and due deliberation, it is hereby ordered that Frank J. Glinski, William F. Keenan and all parties to this action, their agents, attorneys and servants, their successors and all other persons are hereby forever restrained and enjoined from interfering with the carrying out and execution by any and all New York State officers and election officials and their successors and all other persons of the order of this court of May 24, 1965.

"Dated: July 13, 1965.

Sterry R. Waterman,
United States Circuit Judge

Sylvester J. Ryan,
United States District Judge

Richard H. Levet,
United States District Judge."

I hereby, in the presence of counsel in open court, hand this original signed order to the clerk of the court.

APPENDIX B

Opinion of Mr. Justice Culkin In *Matter of Orans*

SUPREME COURT

NEW YORK COUNTY

SPECIAL TERM—PART I.

Index Nos. 00869/1965; 01139/1965

TITLE

CULKIN, J.:

This is a motion brought by Anthony J. Travia and Joseph Zaretzki, New York State Assembly Speaker and President pro tem of the State Senate respectively, for leave to intervene as parties petitioner herein. They assert intervening claims on their own behalves, as members of the Legislature, citizens and taxpayers and on behalf of all citizens and taxpayers of New York. Assuming permission to intervene will be granted, these applicants further move for an order, pursuant to Article 43 of the CPLR, appointing three referees,

> "* * * for the purpose of formulating a comprehensive plan to reapportion the Senate and Assembly of this State, without regard to political considerations, and in a manner which complies with the Fourteenth Amendment of the United States Constitution and with all applicable provisions of the New York State Constitution not in conflict with the United States Constitution * * *".

Petitioners also seek an order decreeing that the November 1966 election of members of the Legislature is to proceed

upon the basis of such plan, unless the Legislature enacts an acceptable reapportionment plan of its own on or before February 1, 1966.

A brief review of recent history is necessary to put the instant proceeding in proper perspective. Following a determination by the Supreme Court of the United States that the apportionment under which our present Legislature was elected is invalid under the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution (*WMCA, Inc.* v. *Lomenzo,* 377 U. S. 633), the matter was remanded to a three-judge District Court for further proceedings. On July 27, 1964, that court issued an order providing (1) that the 1964 legislative elections could proceed under the invalidated apportionment system but that the legislators would be permitted to serve only a one-year term, instead of the two-year term provided in our State Constitution, (2) that a special 1965 election must be held under a constitutionally valid apportionment plan to be enacted by the New York Legislature and submitted to the District Court for approval not later than April 1, 1965, the legislators so elected again to serve for only one year and (3) the regularly scheduled November 1966 election for a normal two-year term would be held under the same or some other court-approved reapportionment plan. On appeal the United States Supreme Court summarily affirmed this order (sub. nom. *Hughes* v. *WMCA, Inc.,* 379 U. S. 694). A special session of the Legislature was convened late in 1964, wherein a series of Reapportionment Compliance Acts were enacted, and, in due course, these were submitted to the three-judge District Court for approval. That court rejected three of the plans submitted but declared that Plan A (Chap. 976 of the Laws of 1964) complied with the provisions of the Federal Con-

stitution and the order of July 27, 1964 (238 F. Supp. 916). The District Court did not concern itself with objections to Plan A based upon claimed violations of the State Constitution, but indicated that such questions were properly to be decided by our State courts. This was in conformity with the views expressed by the United States Supreme Court in a number of recent reapportionment cases, to the effect that determination of questions of State constitutionality should be left to the State courts and that the greatest possible deference to State action should be shown by the Federal courts (see e.g., *Reynolds* v. *Sims,* 377 U. S. 533 and related cases decided the same date, June 15, 1964; see also *Scott* v. *Germano,* 381 U. S. 407, June 1, 1965).

In January, 1965, petitioner Orans commenced the captioned special proceeding which resulted in a Special Term judgment declaring that the federally approved Plan A (the Reapportionment Compliance Act of 1964), which provided for an Assembly consisting of 165 members violated a State constitutional provision calling for an Assembly of 150 members. The act was also held void as to State Senate reapportionment in view of the State constitutional provision that reapportionment and redistricting of both Senate and Assemby must be by the same law (45 Misc. 2d 616, Levy, J.) (Meanwhile, the three-judge District Court extended the State's deadline for submitting an acceptable reapportionment plan from April 1, 1965, to May 5, 1965.) On April 14, 1965, the Court of Appeals affirmed this court's judgment as to the unconstitutionality of the 1964 Reapportionment Compliance Act (15 N. Y. 2d 339). The present Legislature then made a belated attempt to devise a reapportionment plan within the 150-member limitation, but the plans, as of the May deadline, were incomplete and wholly inadequate. Ignoring the Court of Appeals hold-

ing in this case, that Plan A violated the New York State Constitution, a majority of the three-judge District Court, on May 18, 1965, ordered the November 1965 legislative election to proceed under Plan A. The United States Supreme Court refused to grant a stay of the May 18th order and refused to accelerate an appeal (sub. nom. *Travia* v. *Lomenzo,* 381 U. S. 431). Thereafter, a new State court action was commenced in Supreme Court, Albany County, by State Senator Glinski, to enjoin all State officials from conducting the 1965 November election under the invalidated Plan A. On July 9, 1965, the Court of Appeals rendered a decison in this new action enjoining the holding of the 1965 election (*Glinski* v. *Lomenzo,*——N. Y. 2d—— No. 300, July 9, 1965). This action was based upon a finding by a majority of the court that no "final and binding" order requiring the election had yet been issued by the three-judge District Court in *WMCA, Inc.* v. *Lomenzo,* and the court's obligation to prevent the holding of an election which violates our State Constitution (see, *Moore* v. *Walsh,* 286 N. Y. 552). The Court of Appeals proved to be mistaken as to the intent of the District Court. On July 13, 1965, said District Court enjoined all persons from interfering in any way with the holding of the November 1965 election under Plan A. The United States Supreme Court (Mr. Justice Harlan acting) has refused to stay this order pending appeal; consequently, the 1965 legislative election shall have been held before this matter is again considered by the United States Supreme Court.

Immediately upon denial of said stay, the instant applications were brought herein. Since Assembly Speaker Travia was a necessary party respondent in the original review proceedings commenced herein (McKinney's Un-

consolidated Laws, § 4221 et seq. [Laws of 1911, Chap. 773]), his right to intervene must be deemed absolute (CPLR 1012 [a] 1). However, such intervention must be as a party respondent and shall take the form of a substitution of parties as between respondent Borkowski and intervenor Travia. Of course, the fact that intervenor Travia is a respondent does not prevent him from joining intervenor Zaretzki in seeking affirmative relief herein.

The application of Senator Zaretzki to intervene as a party petitioner is granted. Such intervention appears proper under CPLR 1012 (a) 2 and shall be allowed, in any event, under CPLR 1013. Petitioner Orans opposes the intervention of petitioner Zaretzki on the ground that the Senator's interests and the interests of those he purports to represent in this proceeding are being adequately represented by the present petitioners. His attorney notes with pride that petitioners have been the successful parties thus far. However, the foregoing recitation of recent events demonsrates that petitioners' victory thus far is a Pyrrhic one. Notwithstanding a declaration of the invalidity of Plan A (15 N. Y. 2d 339), we face the possibility of having the federal courts impose such reapportionment plan permanently upon our State. For reasons discussed below, it is necessary for this Court to act *now* in this matter. Consequently, the interest of all the citizens and taxpayers of New York State are being inadequately represented by present petitioners to the extent that said petitioners oppose a request for affirmative relief at this time when such a request appears to be in the best interest of our citizens. Indeed, in the course of argument, petitioner Orans has come to concede the need for eventual intervention of this Court in the manner requested by the movants, and now asks that denial of the requested reference be without

prejudice to a renewal at some later time. The remaining petitioners through their spokesman, Edward I. Koch, concede the right of both applicants to intervene herein, approve of the request for the appointment of referees, but oppose the nomination of any present legislator or one chosen by such legislator on the grounds of likely partisanship and they ask this Court to select prominent nonpartisan citizens for the task of reapportionment.

Respondents oppose the intervention and the further requested relief on a number of unacceptable grounds. Respondents contend that there is nothing left of this proceeding, originated pursuant to Article III, Section 5 of the Constitution of the State of New York and Chapter 773 of the Laws of 1911 (McKinney's Unconsolidated Laws, § 4221 et seq.), in which the movants may intervene. They contend that the original proceeding ended in a final judgment (45 Misc. 2d 616) affirmed by the Court of Appeals (15 N. Y. 2d 339) and that this "exhausted" the court's power to proceed pursuant to the special statutory review provision. If the court's general equity power is being invoked, argue respondents, then let the intervenors do it by appropriate plenary proceedings, rather than by attempting to revive the instant cause. In so arguing respondents misread and misunderstand the purpose of the special statutory provisions for reapportionment review. Respondents would make it a meaningless procedure whereby the courts make abstract declarations of constitutionality without any regard to the practical consequences of such declarations. In the present situation, the intervention of the three-judge District Court has prevented enforcement of injunctive relief granted as a natural consequence of the declaration of unconstitutionality. Should our Legislature fail to enact a new valid apportionment statute, there is every

likelihood that this unconstitutional Plan A will be given further, possibly permanent, effect by the federal courts. Chapter 773 of the Laws of 1911 empowers this court, in apportionment review proceedings, to grant such "other relief as is proper", that is, such relief as is necessary to effectuate the court's primary determination. In order to give effect to the prior determination herein, it is necessary that this Court fashion some immediate and continuing relief, and the instant applications are appropriate means of securing such relief.

Moreover, the order of this court dated March 24, 1965 (Levy, J.) expressly recites that this court retains jurisdiction of the captioned proceedings,

> "* * *for the purpose of* * *conducting such further proceedings as any party may request or as may be appropriate in the light of further proceedings in these proceedings or in WMCA Inc. v. Lomenzo, including (but without limitation) applications for injunctive or other relief as may be appropriate to give effect to this judgment or as justice may require."

The instant applications fall squarely within this reservation of jurisdiction.

Respondents next argue that even if this proceeding is properly before the court, the resquested relief should be denied, first, because the same relief was sought in *Glinski* v. *Lomenzo, supra,* found to be inappropriate and second, because both our State Constitution and our Court of Appeals require that reapportionment be left to the Legislature.

It would appear unwise to attempt to rely in any way upon *Glinski* v. *Lomenzo, supra.* The Court of Appeals

enjoined the holding of the 1965 election, and three judges opinioned that until the Legislature had an opportunity to formulate a valid plan the present legislators would continue to sit under a system of weighted voting. It is with this relief in mind that we must view the court's affirmance of the dismissal of one cause of action calling for the appointment of a Special Master to promulgate a new apportionment plan for 1966. The three-judge District Court has now frustrated that decision by ordering the November 1965 election to be held pursuant to Plan A. We cannot know how the court might have treated the request for a Special Master if squarely faced with federal judicial intervention, and this court will not join respondents in speculating.

The present intervenors seek a reference pursuant to Article 43 of the CPLR. That article would seem to be inapposite since it concerns itself only with the powers to be given, and procedures to be followed by referees. It is CPLR 4001 which invests the court with whatever power it possesses to appoint referees in the ordinary course of events.

It may well be that no precedent exists for the appointment of a special referee, or panel of referees, or jury of experts, or advisory commission, for the purposes herein intended. However, we have been presented with an extraordinary situation, a constitutional crisis, which requires extraordinary actions if the sovereignty of this State is to be preserved. "* * * [I]f we can find no precedent we must establish one. The court should be resourceful in fashioning a remedy commensurate with a complex situation." (*White* v. *Anderson,* 394 P. 2d 333, 338.) [It is worthy of mention that respondents raised no objection to the proposed use of a referee or Special Master by the

District Court and, indeed, argue here that the likelihood of such appointment should deter this court from acting.]

Respondents are correct in stating that the judiciary of this State has traditionally maintained a "hands off" attitude with regard to reapportionment. Our courts have held that even where the Legislature fails to act, it is not the province of our courts to undertake this essentially political function (see, *Burns* v. *Flynn,* 1935, 155 Misc. 2d 742, aff'd 245 App. Div. 799, aff'd 268 N. Y. 601). In the affirmance of the original proceeding herein (*Matter of Orans,* 15 N. Y. 2d 339), the Court of Appeals again affirmed the proposition that redistricting and reapportionment are matters for the Legislature. I agree that the primary responsibility remains with the Legislature. I reject the suggestion of petitioners that the members of our Legislature are so immersed in partisan political considerations as to be morally and intellectually incapable of fulfilling the oath to support and defend *both* the Federal Constitution and the Constitution of the State of New York. I reject the pre-judgment of our present legislative leaders, intervenors herein, that neither the present Legislature in Special Session nor the 1966 Legislature in Regular Session is likely to formulate any acceptable reapportionment plan although squarely faced with the duty of doing so. I also reject the suggestion of respondents that we just give up and throw ourselves on the mercy and wisdom of the federal District Court. I am of the view that reapportionment is a function which can be *best* accomplished by the Legislature. The composition of the Legislature, the knowledge which its members from every part of the state bring to its deliberations, its techniques for gathering information, including existing committees on reapportionment, the expertise its members have so recently acquired in the

task of redistricting, and other factors inherent in the legislative process make it the most appropriate body for reapportionment (Accord: *Butcher* v. *Bloom,* 415 Pa. 438, 203 A. 2d 556 (1964)). Consequently, whatever steps are taken by the court, our Legislature must and shall be given a further opportunity to enact a constitutionally valid reapportionment plan (see, *e.g., Maryland Committee* v. *Tawes,* 377 U. S. 656, 676; *Davis* v. *Mann,* 377 U. S. 678, 692-693).

However, having affirmed my faith in the ability of our Legislature to perform its constitutional duty, I cannot close my eyes to the possibilty that our Legislature may, nevertheless, fail to reasonably act. The consequences of legislative inaction are unmistakably clear—judicial intervention and, if necessary, judicial assumption of the legislative task of reapportionment (see, e.g., *Reynolds* v. *Sims,* 377 U. S. 533). We may lament with Mr. Justice Harlan that "* * * it is difficult to imagine a more intolerable and inappropriate interference by the judiciary with the independent legislatures of the States" (dissenting, in *Reynolds* v. *Sims, supra,* at p. 615), but we must face the reality of such interference and its consequences. The District Court in *WMCA, Inc.* v. *Lomenzo* had heretofore acted with commendable restraint. Nevertheless, that Court has now decreed that temporary violence must be done to our State Constitution rather than permit our citizens to endure a malapportioned Legislature beyond December 31, 1965. Moreover, when faced with the failure of the Legislature to formulate an apportionment plan which conformed to both federal and state constitutional requirements, by the May 5, 1965 deadline, the federal court unhesitatingly ordered the coming election pursuant to a plan which does further violence to our State Constitution. There is little

reason to expect that our State Constitution will fare any better in respect of the November 1966 election should State inaction force the federal District Court to further intervene. This is so not because of any antipathy towards our state government or its constitution on the part of the federal court (save where our Constitution conflicts with the United States Constitution) but rather because determination of state constitutional standards is generally not a concern of the District Court but is left to the state courts. Illustratively, discrimination in districting based purely on political consideration (i.e., gerrymandering) is violative of our state constitution. Such discrimination has not yet been held to be within the ambit of the Equal Protection Clause of the Fourteenth Amendment. Consequently, it would appear that a federal District Court imposing a reapportionment plan upon a state need not consider the question of gerrymander. Indeed, if it be so advised, the federal court need only give consideration to the mandate that both houses of the Legislature shall be apportioned on the basis of population, and disregard all else. It appeared uncertain from the initial line of reapportionment cases decided on June 15, 1964 (see, *e.g.*, *Reynolds* v. *Sims*, 377 U. S. 533), whether the Supreme Court had delegated the task of supervising State reapportionment exclusively to the local District Courts or whether State courts were also empowered to control reapportionment. Respondents have proceeded in this action and in *WMCA, Inc.* v. *Lomenzo* as if they believed that the Federal court had exclusive power over reapportionment. Even the Court of Appeals in its prior opinion herein (15 N. Y. 2d 339) appears to suggest that the judiciary defers to the Legislature on questions of reapportionment not merely because that body is best equipped for the task, but because

the traditional notion that the judiciary lacks the power to supervise reapportionment still prevails. However, all uncertainty as to the State court's power to act has now been dispelled,

> "* * * The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged. Maryland Committee v. Tawes, 377 U. S. 656, 12 L. Ed. 2d 595, 607, 84 S. Ct. 1442 (1964); Scranton v. Drew, 379 U. S. 40, 13 L. Ed. 2d 107, 85 S. Ct. 207 (1963); citing Butcher v. Bloom, 415 Pa. 438, 203 A. 2d 556 (1964); Jackson v. Bodine, 43 N. J. 453, 205 A. 2d 713, 724 (1964). See also Kidd v. McCanless, 200 Tenn. 273, 292 S. W. 2d 40 (1956), and discussion thereof in Baker v. Carr, 369 U. S. 186, 235-236, 7 L. Ed. 2d 663, 696, 82 S. Ct. 691 (1962)." *Scott* v. *Germano,* 381 U. S. 407 (June 1, 1965).

In *Scott* v. *Germano,* the United States Supreme Court compelled the three-judge District Court to "stay its hand" since the State Court (Illinois) has now stepped into the picture and has assumed supervision of the problem. It is interesting that Mr. Justice Harlan, in denying a stay from the most recent order in *WMCA, Inc.* v. *Lomenzo,* emphasized the Court's preference for State court action. He stated that the Supreme Court

> "* * * has repeatedly encouraged the state courts to fashion appropriate relief in reapportionment cases, even after a federal court has itself entered an order" (citing cases). U. S. , Reported in The New York Times, July 17, 1965.

This last stated preference for State court action "even after a federal court has itself entered an order", is this court's answer to respondent's final argument (endorsed by the minority in *Glinski* v. *Lomenzo, supra*) that this court should defer to the District Court because it first obtained jurisdiction over the dispute. Whatever apportionment plan is adopted for the November 1966 election must eventually be submitted to the three-judge District Court to determine the plan's conformity to federal constitutional standards. However, the question remains, shall the State court enter the picture, commence supervision of reapportionment and thus incline the Federal court to stay its hand until the sole issue remaining is the federal question of compliance with the one-man, one-vote mandate?

Indeed, the basic question presented to this court is not whether there shall be judicial intervention in the event of legislative inaction or impotence. Judicial intervention is a foregone conclusion in that unfortunate event. The question to be decided is whether immediate and direct supervision shall be assumed by the State courts or whether the Federal court shall be obliged to again fill the void created by State inaction. Our Court of Appeals has already dictated the choice. "To turn the whole thing over to the Federal courts would be an abdication of the State's sovereignty." (*Matter of Orans,* 15 N. Y. 2d 339, 352.)

Having expressed the view that the court shall find the power to appoint a panel of experts, or referees, if that be necessary, and the further view that the present and upcoming Legislature must be given another opportunity to formulate a valid plan before this court will take the drastic step of formulating its own plan of reapportionment, it logically follows that I am disposed to defer deci-

sion on the employment of a panel of referees, and consequently the selection of individual members of said panel at this time. It has been called to the court's attention that subsequent to oral argument on these applications, the Governor signed into law Chapter 1070 of the Laws of 1965 providing for a June primary in 1966. The primary election is scheduled to be held on June 21, 1966. As a consequence, the deadline for filing a statement of party positions to be filled at such election (Election Law § 18) is March 8, 1966. The first day to circulate designating petitions will be April 5, 1966 (Election Law § 136[5]). This is also the first day to circulate nominating petitions for delegates to the State Constitutional Convention to be convened in 1967 (Chap. 371, Laws of 1965). The court is also mindful of the fact that any reapportionment plan it passes upon must thereafter be submitted to the three-judge District Court for approval prior to its implementation.

Considering all of these factors the court determines that it must at this time assume a supervisory role in reapportionment. However reluctantly, this court must impose deadlines upon the Legislature, and in the event of legislative inaction, this court must be prepared to insure that the November 1966 election and the subsequent Constitutional Convention are had pursuant to a redistricting and reapportionment plan which is in conformity with the New York State Constitution as well as the Federal Constitution. Therefore, the intervenors' motion is granted as follows: The court decrees that the regularly scheduled November 1966 election for a normal two-year term shall be held under a plan to reapportion the Senate and Assembly of this State, which complies with the Fourteenth Amendment of the United States Constitution and with all

applicable provisions of the New York State Constitution not in conflict with the United States Constitution. Respondents shall submit such plan for this court's approval on or before February 1, 1966. Upon the failure of respondents to submit such a plan, this court shall undertake the formulation of a reapportionment plan which shall, with Federal District Court approval, govern the November 1966 election of members of the New York Legislature. The finally approved plan shall also form the basis for any primary contests to nominate candidates for the Legislature, for the nomination of delegates to the Constitutional Convention and for any special election to fill vacancies prior to December 31, 1968. The court may upon its own motion, at any time, appoint an appropriate number of referees, or jury of experts to assist in the formulation of a comprehensive reapportionment plan as aforesaid, should the court determine that the Legislature and the respondents herein are not proceeding with reasonable diligence so as to permit completion of a valid plan by February 1, 1966. The court also reserves decision as to whether or not it shall, in all events, appoint such referees or experts to assist the court in determining whether such plan or plans as are submitted by respondents are in conformity with constitutional requirements. Settle order.

Dated: August 24th, 1965.

APPENDIX C

Order of Mr. Justice Culkin In *Matter of Orans*

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, in the Borough of Manhattan, City of New York, this 1st day of September, 1965.

Present: HON. GERALD P. CULKIN, Justice.

TITLE

Anthony J. Travia and Joseph Zaretzki having moved this Court by order to show cause dated July 12, 1965, for an order permitting the said Travia and Zaretzki to intervene as parties petitioner, and for an order appointing referees for the purpose of formulating a reapportionment plan of the New York State Legislature for submission to the Court, and for other relief, and the said motion having come on to be heard on July 21, and July 22, 1965.

Now, on reading and filing the aforesaid order to show cause, the proposed petition of the applicants for intervention annexed thereto, the motion for the appointment of referees and for other relief annexed thereto, dated July 12, 1965, the affidavits of Anthony J. Travia, sworn to July 12, 1965, and of Jay Greenfield, sworn to July 20, 1965, in support of said motions, and the affidavits of Justin N. Feldman, sworn to July 19, 1965, and exhibit annexed and of George D. Zuckerman, sworn to July 19, 1965, and exhibits annexed in opposition to said motions and after having heard Paul, Weiss, Rifkind, Wharton & Garrison, attorneys for applicants for intervention (Simon H. Rifkind, of counsel), in support of said motions, and Justin N. Feldman, attorney for petitioner Orans, and Louis J. Lef-

kowitz, attorney for respondents Nelson A. Rockefeller, et al. (Donald Zimmerman, of counsel) and Edward I. Koch, attorney for petitioners Koch, Greitzer, Berger and Richman, all in opposition thereto, and due deliberation having been had thereon, and this Court's opinion dated August 24, 1965, having been duly filed,

It is, on motion of Paul, Weiss, Rifkind, Wharton & Garrison, attorneys for applicants for intervention,

ORDERED, that the application of Anthony J. Travia to intervene as a party petitioner be and the same hereby is granted to the extent of substituting the said applicant as a respondent for respondent Ansley Borkowski, without prejudice to any subsequent application to intervene as party petitioner in the event of a change of status of said applicant; and it is further

ORDERED, that respondent Travia, no later than September 10, 1965, shall serve upon the attorneys for all parties to this proceeding, in any of the ways permitted by Rule 2103(b) CPLR, a copy of his answers to the petitions heretofore served herein, and that said other parties have ten (10) days thereafter to make such motions addressed thereto and serve such responsive pleadings thereto as are authorized; and it further

ORDERED, that the application of Joseph Zaretzki to intervene as a party petitioner is in all respects granted; and it is further

ORDERED, that petitioner Joseph Zaretzki, no later than September 10, 1965, shall serve upon the attorneys for all parties to this proceeding, in any of the ways permitted by Rule 2103(b) CPLR, a copy of the petition annexed to the motion papers, and that the said other parties have

ten (10) days thereafter to make such motions addressed thereto and serve such responsive pleadings thereto as are authorized; and it is further

ORDERED, that the titles of the above-entitled proceedings be and the same hereby are amended to read as follows:

Index No. 00869/1965

In the Matter of the Petition of JEROME T. ORANS and JOSEPH ZARETZKI,

Petitioners,

To Review Chapters 976, 977, 978, 979 and 981 of the Laws of 1964, Apportioning and Districting the Senate and Assembly of the State of New York,

NELSON A. ROCKEFELLER, Governor, LOUIS J. LEFKOWITZ, Attorney General, MALCOLM WILSON, Lieutenant Governor, and ANTHONY J. TRAVIA, Speaker of the Assembly,

Respondents.

Index No. 01139/1965

THE VILLAGE INDEPENDENT DEMOCRATS, CAROL GREITZER, EDWARD I. KOCH, MARTIN BERGER, LORRAINE RICHMAN and JOSEPH ZARETZKI,

Petitioners,

To Review the Constitutionality of Chapters 976, 977, 978, 979 and 981 of the Laws of 1964, apportioning and districting the Senate and the Assembly of the State of New York Pursuant to Article III, Section 5, of the Constitution of the State of New York, and Pursuant to Chapter 773 of the Laws of 1911,

NELSON A. ROCKEFELLER, Governor, LOUIS J. LEFKOWITZ, Attorney General, MALCOLM WILSON, Lieutenant Governor, and ANTHONY J. TRAVIA, Speaker of the Assembly,

Respondents.

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and it is further

ORDERED, that the motion of petitioner Zaretzki and respondent Travia for the appointment of referees and for other relief be and the same hereby is granted to the following extent:

(i) it is ORDERED that at the regularly scheduled November 1966 legislative election for the State Senate and State Assemby the candidates elected shall serve for a normal two-year term, and such candidates shall be elected under a plan to reapportion the Senate and Assembly of the State which complies with the Fourteenth Amendment of the United States Constitution and with all applicable provisions of the New York State Constitution not in conflict with the United States Constitution;

(ii) it is ORDERED that respondents shall submit such a plan or plans for this Court's approval at the earliest convenient time but not later than February 1, 1966;

(iii) it is ORDERED that, upon the failure of respondents to submit such a plan, this Court shall undertake the formulation of a reapportionment plan which shall, subject to such action as the United States District Court shall take, govern the November 1966 election of members of the New York Legislature;

(iv) it is ORDERED that such plan shall also govern any primary contests to nominate candidates for the 1967-1968 Legislature, to nominate delegates to any Constitutional Convention held in or after 1966, and shall govern any special election to fill vacancies prior to December 31, 1968; and it further

Appendix C

ORDERED, that, in the event ths Court determines that the Legislature and the respondents herein are not proceeding with reasonable diligence so as to permit completion of a valid plan by February 1, 1966, it may, upon its own motion, or on the motion of any party, formulate such a plan, and in aid thereof may at any time appoint an appropriate number of referees or jury of experts to assist in the formulation of a comprehensive reapportionment plan; and it is further

ORDERED, that the Court reserves decision and jurisdictiton to determine whether it shall appoint such referees or experts to assist the Court in determining whether such plan or plans as are submitted by respondents are in conformity with constitutional requirements; and it is further

ORDERED, that this Court reserves jurisdiction for the purpose of conducting such further proceedings as any party may request or as may be appropriate to give effect to this order or the prior order of this Court.

Enter,

GERALD P. CULKIN,
J. S. C.

Filed Sep. 2, 1965,
New York County Clerk's Office.